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Supreme Court, U.S.
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No. 02-995

IN THE

Supreme Court of the United States

BERWIND CORPORATION,

Petitioner,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Berwind Corporation ("Berwind") respectfully submits this reply to the briefs in opposition to its Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

I. BERWIND HAS NEVER CHALLENGED "CONTROL GROUP" LIABILITY

The Respondents attempt to obscure the sole issue in this case. They pretend that Berwind has argued against "control group" liability. Berwind does not and never has. Nor has Berwind argued that it is not liable for the benefits of former miners of Reitz Coal Company ("Reitz"). On the contrary, Berwind has explicitly agreed from the outset of this case that it is liable for Reitz's obligations because of the "control group" statutory provisions.

The true issue before this Court is whether any statute, including the "control group" statutory provisions, can be used to hold Berwind liable for the benefits of its own former miners, miners it last employed in the early 1960s and before. This Court's Opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), forbids that liability, whether or not Berwind is related to Reitz, and Congress cannot reverse a holding of this Court that is based upon the Constitution. Thus, the fact that "control group" liability is a constitutionally-accepted notion is a red herring.

Indeed, none of the cases the Respondents cite involves using membership in a "control group" to impose liability on an entity for conduct of its own for which it would not otherwise be liable. In contrast, the Respondents here, and the Third Circuit in its opinion below, say that Berwind is liable for miners it itself employed in the distant past because its affiliate, Reitz, signed the 1974 National Bituminous Coal Wage Agreement. *Eastern Enterprises* forbids that result.

II. THERE IS NO EVIDENCE THAT CHANGES IN OWNERSHIP OF REITZ WERE IN ANY WAY IMPROPER

The Respondents now claim that the assignment in this case is justified because of changes in Reitz's corporate structure. In the district court, however, the Respondents never suggested that changes in Reitz's ownership back in the 1970s and 1980s were intended to avoid liability or to conceal anything from anyone. Berwind set forth the history of the ownership of Reitz in an affidavit so that all the ownership facts would be before the trial court. As the trial court stated, the Respondents did not claim in the extensive summary judgment briefing that there was anything significant about those facts:

> A detailed history of the company is set forth in the uncontroverted affidavit of Bruce Reed submitted with plaintiff's summary judgment motion. Except for the facts regarding Reitz set forth in the body of the memorandum, no party has suggested that the history of Reitz has any significance to the instant action.

Pet. App. 54a n.4.

The Respondents for the first time claimed in the Third Circuit that Reitz's corporate history is "a textbook example" of evasive conduct that members of Congress expressed concern about before passage of the Coal Act. There is no basis whatsoever in the record for this claim. The record below is consistent with the changes in ownership of Reitz having occurred for normal and legitimate business reasons and without any attempt to conceal anything from anyone. The Respondents' unfounded criticism of Reitz is apparently calculated to divert attention from the Third Circuit's refusal to honor this Court's Opinion in *Eastern Enterprises*.

III. IT IS IMMATERIAL WHETHER THE COMMISSIONER WILL CONTINUE TO SUBVERT THE CONSTITUTIONAL AUTHORITY OF THIS COURT

The Federal Respondent claims that because the Commissioner has already made her determinations "as to which Coal Act assignments fall within the ambit of *Eastern Enterprises*" it is "unlikely" that cases such as this one "will continue to arise in the future." Fed. Resp. Br. at 17-18. The issue in this case, however, is the authority of this Court to be the final arbiter of Constitutional questions. Thus, it is immaterial whether the Commissioner will continue to subvert that authority. That she has done so already is what has given rise to this case.

In any event, the Federal Respondent is well aware that at this moment a number of litigants are challenging Coal Act assignments made, as here, in reliance upon the "related person" provisions of the Coal Act and in violation of the holding of *Eastern Enterprises*. *See Wheeling-Pittsburgh Steel Corp. v. Commissioner of Soc. Sec.*, No. 5:99CV60 (N.D. W.Va. May 22, 2002), Nos. 02-1799, 02-1800 (4th Cir. filed July 29, 2002); *Nell Jean Indus., Inc. v. Barnhart*, 224 F. Supp. 2d 10 (D.D.C. 2002) (notice of appeal filed April 3, 2003, in D.C. Cir., no docket number yet issued); *Holland v. Turner Elkhorn Mining Co.*, No. 1:02CV02248 (D.D.C. filed Nov. 14, 2002).

In fact, currently pending are two other petitions for certiorari on this issue. *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226 (4th Cir. 2002), *petition for cert. pending*, No. 02-956 (filed Dec. 17, 2002); *Shenango Inc. v. Apfel*, 307 F.3d 174 (3rd Cir. 2002), *petition for cert. pending*, No. 02-1419 (filed March 21, 2003).

CONCLUSION

For the foregoing reasons, and for the reasons stated in Berwind's Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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